Supreme Court, U.S.
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No. 89-1675

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH, and SIMILARLY SITUATED UNNAMED PLAINTIFFS, *Petitioners*,

v.

FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

GREGORY O'DUDEN *
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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this supplemental brief to provide the Court with Senior Circuit Judge Friedman's dissent to the majority opinion by the *en banc* court below. Judge Friedman's dissent (Appendix A), relies upon and summarizes his earlier majority opinion for the panel, which was vacated by the *en banc* ruling. As explained in the Federal Circuit's May 23, 1990 letter (Appendix B), the clerk's office in that court originally forwarded the *en banc* opinion to the parties without the dissent. The clerk's office sought to correct its error by later serving copies of the complete *en banc* ruling. It did not, however, notify the parties that there was a missing

dissent, which has just been discovered by petitioners' counsel. We have alerted government counsel, who was also unaware that a dissenting opinion had been filed.

Respectfully submitted,

GREGORY O'DUDEN *
Director of Litigation

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May 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER, III and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

Appealed from U.S. District Court
for the Central District of California
Judge Hupp

Decided: March 30, 1990

FRIEDMAN, *Senior Circuit Judge*, dissenting.

For the reason given in my opinion for the panel, reported at 883 F.2d 1563, I would reverse the judgment of the district court. To summarize, I conclude that:

1. The holding that the Civil Service Reform Act of 1978 bars government employees covered by a collective

bargaining agreement containing a grievance procedure that does not exclude overtime claims under the Fair Labor Standards Act from maintaining a district court suit asserting such claims, constitutes a *pro tanto* repeal of the right given government employees to maintain such a suit in the district court. This is so because it "eliminates the right to sue previously granted by another federal statute." 883 F.2d 1566. As the Supreme Court frequently has stated, most recently in *United States v. Fausto*, 484 U.S. 439, 452 (1988), "repeals by implication are strongly disfavored," are "not favored," or are "disfavored." See the cases cited, 883 F.2d at 1566.

2. Since Congress had given government employees the right to sue under the Fair Labor Standards Act only in 1974, four years before it enacted the Civil Service Reform Act, "one would think that if Congress had intended the Reform Act to take away that right for the substantial number of federal employees covered by collective bargaining agreements, it would expressly have so provided or stated." *Id.* at 1567. There is nothing in the language or the legislative history of the Reform Act expressly showing that Congress so intended.

3. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the Supreme Court held that a provision in a collective bargaining agreement requiring that "any controversy" between the parties be resolved through the binding grievance procedure under the contract, did not bar employees covered by the contract, who unsuccessfully had invoked the grievance procedure to assert claims based upon violations of the Fair Labor Standards Act, from maintaining an action in the district court asserting those claims. Although *Barrentine* is distinguishable because it involved solely a collective bargaining agreement and did not involve the impact of the Civil Service Reform Act upon the Fair Labor Standards Act, the reasoning of the Supreme Court is equally

applicable to the present situation and calls for the same result here.

My views are developed in considerable detail in the panel opinion, and there is no occasion to repeat them here. In my opinion, the "exclusivity" provision of the Reform Act cannot properly be applied to bar the appellants from maintaining a district court action alleging violations of the Fair Labor Standards Act.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Telephone: 633-6550
Area Code 202

May 23, 1990

Mr. Gregory O'Duden
Director of Litigation
1730 K Street, N.W.
Suite 1100
Washington, D.C. 20006

Re: *88-1576, CARTER V GIBBS*

Dear Mr. O'Duden:

This will confirm that the court inadvertently served counsel with an incomplete copy of the March 30, 1990 *in banc* opinion in this matter, by failing to attach the dissent of Senior Circuit Judge Friedman. After the court discovered its error, we forwarded on April 2 complete copies of the *in banc* opinion, including Judge Friedman's dissent, but did not provide a transmittal letter or other notice to explain that we were providing a missing dissent.

We regret any inconvenience that this may have caused.

Very truly yours,

FRANCIS X. GINDHART
Clerk

By /s/ Diane Frye
Chief Deputy Clerk

cc: Jane W. Vanneman